Vol. 13 JULY 1906 No 2

CASE & COMMENT

MONTHLY

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Case and Comment

NOTES OF

RECENT IMPORTANT, INTERESTING DECISIONS

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LEGAL NEWS NOTES AND FACETIÆ

VOL. 13. JULY, 1906. No. 2

CASE AND COMMENT

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THE LAWYERS' CO-OPERATIVE PUB. CO., Rochester, N. Y.

NEW YORK, 81 Nassau St. CHICAGO, 225 Dearborn St.

Canfield's Nursery.

The character of the place which some New York newspapers fought so hard to protect from interference by the authorities, seeming to regard it as a gentleman's parlor which ought to be privileged to defy the laws that apply to common people, has had some light thrown on it by testimony just brought out in consequence of a quarrel between Canfield and his former attorney. It appears that a minor had given three notes for large sums on which $130,000 were paid to the gambler in settlement, and that a senator of the United States acted as medium in the transaction. The defenders of Canfield were so powerful that it seemed doubtful for a time if justice could reach a man who catered especially to rich men's vices. But there was enough soundness in the people and their officials to provide an amendment to the Penal Code by which *habitués* of the place could be compelled, under protection against self-incrimination, to testify against the proprietor, and this was held constitutional in 179 N. Y. 594, 72 N. E. 1148, affirming without opinion 96 App. Div. 201, 89 N. Y. Supp. 364. This triumph for decency is emphasized by the recent testimony indicating that the place was not only a gambling house, but a resort for youthful gamblers.

Selling Bank Stock to Evade Liability.

An attempt by a stockholder in a national bank to evade his liability by a colorable transfer of stock while intending to retain the actual ownership, when the bank is known to be insolvent, by colluding with an irresponsible person with the design to substitute him as the stockholder so as to escape individual liability, is well known to be unavailing to relieve the stockholder; and this has been repeatedly decided.

In the recent case of McDonald *v.* Dewey, 202 U. S. 510, Adv. S. U. S. 1905-6, p. 731, 26 Sup. Ct. Rep. 731, the question arose as to the effect of a transfer by a stockholder with intent to evade responsibility so far as debts subsequently created by the bank were concerned. It was held that, while such a transfer to an irresponsible vendee would leave the original stockholder still liable for debts existing at the time the transfer was made, yet, in view of the requirement of U. S. Rev. Stat. § 5210, U. S. Comp. Stat. 1901, p. 3498, that the list of names and residences of all the shareholders should be kept subject to inspection, and of the provision of

§ 5139, U. S. Comp. Stat. 1901, p. 3461, that every person taking shares by transfer shall succeed to all the rights and liabilities of the prior holder of such shares, and that no change shall be made in the articles of association by which the rights, remedies, or security of the existing creditors shall be impaired, those who subsequently became creditors of the association could not hold the transferrer of the shares liable as a stockholder on their debts. The court said: "We are only applying to this case, by analogy, the ordinary rule of the common law, that a voluntary deed by a person heavily indebted is fraudulent and void as to prior creditors merely upon the ground that he was so indebted, but, as to subsequent creditors, is only void upon evidence that the deed was made in contemplation of future indebtedness." Reference was also made to an Ohio case which gave the same interpretation to a similar statute of that state. Peter *v.* Union Mfg. Co. 56 Ohio St. 181, 46 N. E. 894.

Franchise Tax on Interstate Railroads.

The franchise tax law of New York (Laws 1896, chap. 908, § 182), which levies on corporations an annual tax upon the basis of the amount of their capital stock employed within the state, was contested in the case of People ex rel. New York C. & H. R. R. Co. *v.* Miller, 202 U. S. 584, Adv. S. U. S. 1905–6, p. 714, 26 Sup. Ct. Rep. 714, because no reduction was allowed on account of the considerable proportion of rolling stock of the corporation which, by the familiar course of railway business, is always absent from the state. The railroad company undertook to bring its case within a corollary of the doctrine of Pullman's Palace Car Co. *v.* Pennsylvania, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876, which upheld a state tax upon such portion of the capital stock of a foreign railroad corporation as the miles of track within the state bore to the entire mileage of the railroad. The argument was that, if such portion of the cars as were out of the state could be taxed in another state, they ought not to be taxed in New York; but the railroad company failed to prove that any specific cars, or any average of cars, were so continuously in any other state as to be taxable there. The court says: "The absences relied on were not in the course of travel upon fixed routes, but random excursions of casually chosen cars, determined by the varying orders of particular shippers and the arbitrary convenience of other roads. Therefore we need not consider either whether there is any necessary parallelism between liability elsewhere and immunity at home." The court also denied a contention that the tax in question interfered unconstitutionally with interstate commerce.

Restricting the Fellow-Servant Rule.

The doom of the fellow-servant rule cannot yet be pronounced, and there is much room to debate the question of its justice as applied to the simpler conditions of employment. But in recent years strong pressure for its abolition—at least in the more complicated and dangerous conditions of employment—has been felt in many states. Employers' liability acts abolishing this rule *in toto*, or in part, have been adopted, not only in England, but in Alabama, Massachusetts, Colorado, Indiana, New York, the Canadian Provinces, and Australia. These acts and the judicial interpretation of them are treated exhaustively in Labatt on Master and Servant, vol. II. pages 922, 2402. Colorado has gone the farthest in this matter by a sweeping provision which completely abolishes the whole fellow-servant doctrine. Most of the states, however, which have laws on the subject have abolished the rule only in railroad cases. A dummy railroad is held to be within the Alabama act. A street railway is held not to be within the Minnesota and Texas statutes. But a New York act just enacted abolishes the rule so far as it applies to the negligence of any employee of a "railroad corporation" or its receiver, when the employee has "the authority of superintendence, control, or command of other persons," or "authority to direct or control any other employee in the performance of the duty of such employee." Also those who have, as part of their duty, "physical control or direction of the movement of a signal, switch, locomotive engine, car, train, or telegraph office." This enactment is a part of the railroad corporation

law, and its provisions apply to electric railroads also. It is a marked advance in the movement against the fellow-servant rule.

A kindred bill just now seems likely to be passed by Congress. This, however, has not, at this present writing, become a law. The power of Congress in this direction, so far as the states are concerned, is derived, of course, from the commerce clause of the Constitution; and some perplexing questions may arise if Congress acts on the matter, with respect to the extent of its authority and the effect of the state and Federal laws respectively, where they cover the same ground.

The Case of Senator Burton.

A decision of the United States Supreme Court, handed down May 21, affirms the conviction, under U. S. Rev. Stat. § 1782, of Joseph Ralph Burton, for receiving compensation for services rendered before a department of the government in relation to a proceeding in which the United States was interested. The enactment of this section is held to be within the powers of the Federal government. The contention of the defense, that this interfered with the authority of the Senate of the United States over its members, was rejected by the court. And it was also held that this statute did not interfere with a senator's discharge of his legitimate duties. But it was held that the office of a senator of the United States was not held "under the government of the United States," so as to make conviction a bar to subsequent incumbency of that office, under the provision of the statute by which the convict is forever after incapable of holding any office of honor, trust, or profit "under the government of the United States." That is to say, the conviction does not operate of its own force to exclude a convicted senator from the Senate. Senator Burton was employed by a corporation in St. Louis as its agent and attorney in a fraud-order inquiry pending before the Postoffice Department, to determine whether the corporation was engaged in a scheme to obtain money through the mails by fraud. On the question whether or not the government was "directly or indirectly interested" in this matter within the meaning of § 1782, the majority of the court decided in the affirmative, but on this point three judges dissented. It is reported that an attempt will be made to have a rehearing of the case, probably in the hope of changing the minds of some of the majority of the court on this point. In the meantime the convicted senator's expulsion from the Senate seemed probable; but this has been anticipated by his resignation.

The prosecution and conviction of a senator of the United States for crime is an event well-nigh, if not quite, as grave as such a prosecution would be against a justice of the Supreme Court. When revelations of graft and corruption extend not only to the very greatest financial institutions in the United States, but even to the most exalted legislative body in the nation, it is disheartening. But the soundness of the heart of the nation at large is demonstrated by the thoroughness and boldness by which a campaign of investigation, prosecution, and conviction is successfully carried forward against those classes of criminals who have hitherto been too powerful to fear attack.

A Solemn "Outlook."

On the President's suggestion respecting a progressive inheritance tax, the Outlook of New York said: "We doubt whether the Federal government can, under the Constitution, levy such a progressive tax." Inasmuch as the Supreme Court of the United States had twice decided, with but one dissenting justice, that such a tax is not unconstitutional, the Outlook's opinion to the contrary was a mistake. This, however, was not very strange or very discreditable. The obvious thing, when the Outlook found out its mistake, was to admit it frankly. Instead of that it published an editorial in the June Outlook, page 150, which is somewhat amusing. Referring to its previous declaration on the question, it said: "We have since made a somewhat careful examination of the authorities, and our matured conviction is that the weight, both of judicial authority and of legal reasoning, sustains the constitutionality of the tax proposed by the President." It then refers to the Supreme Court cases on the question, and makes some general quotations from them with respect to direct taxes, and

as to the danger of grave consequences in the future if progressive taxes are recognized, and winds up with another solemn declaration of its own opinion in the following words: "It is our carefully considered judgment that there is no good ground to doubt the constitutionality of the graduated inheritance tax proposed by the President." This leaves the matter so that the reader, especially the lay reader of the Outlook, will naturally understand that the conclusion announced rests much more upon the Outlook's "somewhat careful examination of the authorities," its "matured conviction" on the "weight, both of judicial authority and of legal reasoning," and its "carefully considered judgment," than it does upon the plain fact that the court of ultimate authority on the question has settled it. This, however, is more amusing than serious, and is after all encouraging. By admitting a mistake, however grudgingly and vaguely, the Outlook makes a concession to honesty which it has not always been willing to make in a similar case.

Of course it might have been honest enough to tell its readers plainly that, since its prior statement, its attention had been called to the decisions of the Supreme Court of the United States which clearly and explicitly decided that the tax was constitutional. But in that case its readers would have perceived that the pretentious Outlook was not infallible,—at least as a legal oracle. Instead of that, it chose a course which befogged the matter and left the profundity and inerrancy of the Outlook unquestioned in the minds of its lay readers. It accomplished this without literally telling a lie. It was a smart piece of work, though not conspicuously pious.

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Adverse possession. The use for agricultural purposes, by adjoining landowners, of otherwise unused and unfenced parts of a railroad right of way, is held, in Roberts *v.* Sioux City & P. R. Co. (Neb.) 2 L.R.A. (N.S) 272, not inconsistent with, or adverse to, the enjoyment of the easement.

Alteration of instruments. That the maker of a note understood that it was to carry interest is held, in Merritt *v.* Dewey (Ill.) 2 L.R.A. (N.S.) 217, not to authorize the insertion of an interest clause without the maker's consent after the execution of the note.

Appeal and error. The right to the custody of a child in accordance with a judgment in a habeas corpus proceeding is held, in Willis *v.* Willis (Ind.) 2 L.R.A. (N.S.) 244, not affected by an appeal, although the statute provides that an appeal shall stay all further proceedings on the judgment.

The setting aside, by an appellate court, of a verdict for plaintiff, and directing a judgment for defendant for failure of evidence, are held, in Gunn *v.* Union R. Co. (R. I.) 2 L.R.A. (N.S.) 362, not to infringe the constitutional right to due process of law and trial by jury.

Error in refusing a request to charge is held, in Dambmann *v.* Metropolitan Street R. Co. (N. Y.) 2 L.R.A. (N.S.) 309, not to be corrected by a subsequent charge to the same effect, where the court again expressly refuses to give the first instruction asked.

Bail. Money deposited as bail to secure the release of another from custody in which he is illegally detained is held, in State *ex rel.* Grass *v.* White (Wash.) 2 L.R.A. (N.S.) 563, to be recoverable back, although the condition of the deposit is not complied with.

Banks. The custom of a bank to send

paper received for collection to the bank on which it is drawn is held, in Farley Nat. Bank *v.* Pollak & Bernheimer (Ala.) 2 L. R.A.(N.S.) 194, to be void for unreasonableness.

Funds of an insolvent bank on deposit with a correspondent bank are held, in Clark *v.* Toronto Bank (Kan.) 2 L.R.A. (N.S.) 83, to pass to the receiver, rather than the holder of a draft issued before the appointment of the receiver, but not presented until after the drawee had notice of the receivership.

Bills and notes. One taking, in payment of equipment furnished to a contractor for the construction of a street railway, notes made by and payable to the contractor itself, containing the indorsement of the company for which the maker is performing the work, was held, in J. G. Brill Co. *v.* Norton & T. Street R. Co. (Mass.) 2 L.R. A.(N.S.) 525, to be chargeable with knowledge that the indorsement was merely for accommodation, and therefore *ultra vires*.

Buildings. A building consisting of a wooden frame covered on the outside with sheets of corrugated iron, the interior, including the floor, ceiling, etc., being entirely of wood, was held, in Sylvania *v.* Hilton (Ga.) 2 L.R.A.(N.S.) 483, not to meet the requirements of a municipal ordinance requiring buildings to be constructed of brick, stone, or other incombustible material, and covered with tin, or metallic, or fireproof roofing.

Carriers. The liability, or nonliability, of a carrier for an unprovoked assault by a third person upon a passenger is held, in Brown *v.* Chicago, R. I. & P. R. Co. (C. C. A. 8th C.) 2 L. R. A. (N. S.) 105, to depend upon the question whether the employees knew, or, by the exercise of proper care could have known, and guarded against, the threatened injury.

A purchaser who, before purchasing a ticket, was informed by the agent that a certain train stopped at his station, and was given a timetable also showing that the train was scheduled to stop there, was held, in McDonald *v.* Central R. Co. (N. J. Err. & App.) 2 L.R.A.(N.S.) 505, to have, by contract, a right to have the train stop at that point, rendering his ejection at the last preceding station wrongful.

A passenger notified that the next station at which the train will stop is his destination is held, in Baltimore & O. S. W. R. Co. *v.* Mullen (Ill.) 2 L.R.A.(N.S.) 115, to have a right to assume that the car will stop at the proper place for him to get off.

A railroad company is held, in St. Louis Southwestern R. Co. *v.* White (Tex.) 2 L. R.A.(N.S.) 110, to be liable for the proximate injury resulting from misdirections, given by its ticket agent when applied to by an intending passenger for information as to the best route by which to reach his destination, and furnishing a ticket in accordance with such directions.

A carrier having led passengers to believe that the doors of the vestibule to a car would be kept closed between stations, and then negligently left the doors open, was held liable, in Crandall *v.* Minneapolis, St. P. & S. M. R. Co. (Minn.) 2 L.R.A.(N.S.) 645, to a passenger injured thereby.

Champerty. A contract to make compensation for services to be rendered in obtaining evidence and securing a divorce is held to be void in Barngrover *v.* Pettigrew (Iowa) 2 L.R.A.(N.S.) 260; and a recovery upon a *quantum meruit* for the services was also denied.

Charities. A corporation organized under a private charter, solely for educational purposes, is held, in Parks *v.* Northwestern University (Ill.) 2 L.R.A.(N.S.) 556, to be a charitable institution, within the rule exempting such institutions from liability for negligence of servants, notwithstanding that tuition fees are charged.

Conflict of laws. A married woman who indorsed, in a state where her contract was of no effect, a note dated and payable in another state, where the indorsement would be valid, and where the note was negotiated, was held, in Chemical Nat. Bank *v.* Kellogg (N. Y.) 2 L.R.A.(N.S.) 299, to be estopped, as against a bona fide purchaser, to show the true facts.

Contempt. Abusing and assaulting a judge after he has retired from the court room, upon adjournment subject to notice, because of his disposition of a case immediately prior thereto, is held, in *Ex parte* McCown (N. C.) 2 L.R.A.(N.S.) 603, to constitute contempt at common law.

Corporations. The purchase, by a corporation, of shares of its own capital stock is held, in Hall *v.* Alabama Terminal & I. Co. (Ala.) 2 L.R.A.(N.S.) 130, to be a fraud upon its creditors.

The right of majority stockholders, who have voted to dissolve the corporation, to proceed for a judicial declaration of forfeiture of charter, is upheld in Chilhowee Woolen Mills *v.* State *ex rel.* Majority Stockholders Chilhowee Woolen Mills Co. (Tenn.) 2 L.R.A.(N.S.) 493, under a statute providing that an action lies for dissolution of a corporation if it does acts which amount to a forfeiture of its rights.

The right to make preferred stock non-voting is upheld, under the Missouri statute, in State *ex rel.* Frank *v.* Swanger (Mo.) 2 L.R.A.(N.S.) 121.

A statutory agent of a foreign corporation to receive service of summons is held, in Bennett *v.* Supreme Tent, K. of M. (Wash.) 2 L.R.A.(N.S.) 389, to have no power to admit or waive service where it has not been properly made.

Criminal law. It is held, in Ralph *v.* State (Ga.) 2 L.R.A.(N.S.) 509, that where a defendant is deaf, and cannot hear the evidence of the witnesses for the state, the presiding judge should permit some reasonable mode of having their evidence communicated to him.

Death. The mother of an illegitimate child is held, in McDonald *v.* Southern R. Co. (S. C.) 2 L.R.A.(N.S.) 640, not to be within the meaning of a statute giving a right of action for the benefit of the parent in case of the negligent killing of an infant.

Discovery. The exhibition, by one seeking damages for personal injuries, of the injured portion of his person to the jury, is held, in Houston & T. C. R. Co. *v.* Anglin (Tex.) 2 L.R.A.(N.S.) 386, to waive his right to object to the court's requiring him to exhibit it for examination by defendant's witnesses.

Divorce. The obligation to comply with a provision of a decree of divorce directing the husband to pay the wife a certain sum annually as alimony, "so long as she may live," is held, in Wilson *v.* Hinman (N. Y.) 2 L.R.A.(N.S.) 232, to cease with his death.

Duress. One who negotiates a loan to take up an existing mortgage upon which foreclosure proceedings have been begun, and who is required, under protest, to pay an illegal bonus to secure a discharge of the mortgage, is held, in Kilpatrick *v.* Germania L. Ins. Co. (N. Y.) 2 L.R.A.(N.S.) 574, to act under duress, and consequently to be entitled to recover the amount paid.

Duties. It is held, in United States *v.* Ninety-Nine Diamonds (C. C. A. 8th C.) 2 L.R.A.(N.S.) 185, that none of the acts denounced by act June 10, 1890, chap. 407, § 9, constitute an offense thereunder, unless they deprive the United States of some of its lawful duties. It is also held that the word "false," in that section, implies wrong or culpable negligence, and signifies knowingly or negligently untrue.

Electric wires. A municipal corporation is held, in Fox *v.* Manchester Village (N. Y.) 2 L.R.A.(N.S.) 474, to be under no obligation to inspect electric wires maintained by others in its streets, if it has no notice, and there is nothing in the condition to indicate, that the same are dangerous.

Eminent domain. Property devoted to railroad purposes was held, in Pittsburgh, Ft. W. & C. R. Co. *v.* Sanitary Dist. of Chicago (Ill.) 2 L.R.A.(N.S.) 226, to be included within the Illinois statute granting a corporation organized to provide a drainage system for a municipal corporation the power to condemn "any and all real property which it may require for its corporate purposes."

A property owner's right to defeat the exercise of the power of eminent domain upon the ground that the party asserting it was not duly incorporated is denied in Central of Georgia R. Co. *v.* Union Springs & N. R. Co. (Ala.) 2 L.R.A.(N.S.) 144.

A refusal to recognize proceedings under a municipal resolution for the condemnation of land for a highway, and appealing therefrom to the court, are held, in State *v.* Jones (N. C.) 2 L.R.A.(N.S.) 313, not to delay the opening of the street until the termination of the appeal.

The owner of a private way enlarged into a public road by the joint action of the owner of the fee and the public authorities is held, in Clayton *v.* Gilmer County Court (W. Va.) 2 L.R.A.(N.S.) 598, not entitled to damages.

Evidence. Evidence that deceased was known by accused to be a violent, passionate, and dangerous man is held, in Com. *v.* Tircinski (Mass.) 2 L.R.A.(N.S.) 102, to be admissible upon trial of one for killing a person who had assaulted him immediately before the striking of the fatal blow.

A married woman, relatrix in a bastardy proceeding, is held, in Evans *v.* State (Ind.)

2 L.R.A.(N.S.) 619, to be competent to testify to nonaccess of husband, under a statute making her a competent witness.

Secondary evidence to identify a record of conviction is held inadmissible, in Junior *v.* State (Ark.) 2 L.R.A.(N.S.) 652, until the absence of the magistrate who rendered the judgment, or his successor in office, the proper custodian of the record, is accounted for.

That a witness had never heard the matter discussed is held, in Sinclair *v.* State (Miss.) 2 L.R.A.(N.S.) 553, not to render him incompetent to testify to the general reputation of accused for peace or violence in the community.

Books of account are held, in Lewis *v.* England (Wyo.) 2 L.R.A.(N.S.) 401, to be admissible to prove cash loans, where the items appear in the general course of accounts as part of the business transactions between the parties.

Fire escapes. Compliance with an ordinance requiring construction of fire escapes is held, in Seattle *v.* Hinckley (Wash.) 2 L.R.A.(N.S.) 398, to give no vested right to the continuance of such escapes, preventing the municipality from requiring them to be replaced by others of a different pattern.

Gift. A gift of his accumulated property by a man to his children at a time when he is earning a good income is held, in James *v.* Aller (N. J. Err. & App.) 2 L.R.A.(N.S.) 285, not voidable at his option, although the act may be improvident.

Highways. Owners of property abutting on a highway adjacent to a railway track are held, in Hyde *v.* Fall River (Mass.) 2 L.R.A.(N.S.) 269, not to sustain any special damages by discontinuance of the street within the railroad right of way and the erection of a bridge to carry the street over the tracks, so that, in order to cross the tracks, they are obliged to go away from them until they reach the foot of the bridge approach.

The right to recover against a municipality for an injury from a defective street is denied in Covington *v.* Lee (Ky.) 2 L.R.A.(N.S.) 481, where the person injured was so drunk that he was unable to use the care to protect himself from harm that an ordinarily prudent person, if sober, would have exercised under the same circumstances.

The liability of a municipal corporation for injuries occasioned by a latent defect in the street or roads is held, in Campbell *v.* Elkins (W. Va.) 2 L.R.A.(N.S.) 159, to be absolute, and not dependent upon lack of diligence or care on the part of the corporation.

Homicide. An instruction in a prosecution for homicide that self-defense cannot be made out unless the accused in good faith endeavored to escape is held, in State *v.* Gardner (Minn.) 2 L.R.A.(N.S.) 49, to be reversible error, where the proved circumstances precluded any means of escape or retreat without great increase in peril of death or of great bodily harm, notwithstanding that the jury was also instructed that accused was not necessarily bound to retreat.

Husband and wife. A contract between husband and wife for the support of their child was held, in Ward *v.* Goodrich (Colo.) 2 L.R.A.(N.S.) 201, not void as against public policy because entered into pending divorce proceedings, where neither its purpose nor effect in any way facilitated the granting of the divorce.

Indictment. An indictment charging the commission of a crime on a certain day in the year 18903 is held, in Terrell *v.* State (Ind.) 2 L.R.A.(N.S.) 251, fatally defective notwithstanding a statutory provision that no indictment shall be deemed invalid for stating imperfectly the time when the offense was committed.

Injunction. Upon the institution of bankruptcy proceedings against the maker of a deed of trust to secure debts, it is held, in *Re* Jersey Island Packing Co. (C. C. A. 9th C.) 2 L.R.A.(N.S.) 560, that the court may enjoin the sale of the property under the terms of the trust deed, for the purpose of conserving the grantor's equity in the property for the benefit of his unsecured creditors.

A contract by a municipal corporation to grant the use of its streets for gas mains, and relinquish rights under former contracts, although in the form of an ordinance, is held, in State *ex rel.* Abel *v.* Gates (Mo.) 2 L.R.A.(N.S.) 152, not to be a legislative act with which the courts have no power to interfere if fraud appears.

The jurisdiction of equity to enjoin the

prosecution of one for violation of a statute against gambling, although he claims to be acting under a municipal ordinance, is denied in Littleton *v.* Burgess (Wyo.) 2 L.R.A.(N.S.) 631.

Innkeepers. An innkeeper was held liable, in Clark *v.* Ball (Colo.) 2 L.R.A. (N.S.) 100, for valuables intrusted to his partner by a guest, and misappropriated after the owner had ceased to be a guest.

Insurance. The liability of officers of a mutual fire insurance company to a member for the amount due him for a loss because they organized the members of the branch which was liable for the loss into a new company, leaving the branch in a state of suspended animation, is denied in Perry *v.* Farmers' Mut. F. Ins. Asso. (N. C.) 2 L.R.A.(N.S.) 165.

Death by asphyxiation from the accidental inhalation of gas while asleep is held, in Travelers' Ins. Co. *v.* Ayers (Ill.) 2 L. R.A.(N.S.) 168, not to be within an accident insurance policy exempting the insurer from liability for death resulting directly or indirectly from any gas or vapor.

That the removal of a family from a house to a near-by village was due to sickness in the family, and accompanied with an intention of returning when the sick recovered, was held, in Knowlton *v.* Patrons' Androscoggin Mut. F. Ins. Co. (Me.) 2 L.R.A.(N.S.) 517, not to prevent vacancy within the meaning of an insurance policy, notwithstanding that the insured was at the house nearly every day.

Reformation of a policy is held, in Ætna Ins. Co. *v.* Brannon (Tex.) 2 L.R.A.(N.S.) 548, not to be necessary where, without the knowledge of the insured, it located the property in a building other than that designated by him.

Intoxicating liquors. A license to operate a saloon in a certain building was held, in Malkan *v.* Chicago (Ill.) 2 L.R.A.(N.S.) 488, not to authorize the operation of two saloons in different rooms in the building.

Judgment. That a decree of a state court having jurisdiction of the parties, upholding a divorce granted in another state, is binding in a third state, and prevents an attack there upon the decree of divorce, is held in Bidwell *v.* Bidwell (N. C.) 2 L.R.A. (N.S.) 324.

Labor union. A contract by a manufacturer to employ as laborers none but members of a particular union is held, in Jacobs *v.* Cohen (N. Y.) 2 L.R.A.(N.S.) 292, not to be void as against public policy.

Larceny. One with whose wife money is left by a finder for his inspection, on her suggestion that it may be his, is held, in Williams *v.* State (Ind.) 2 L.R.A.(N.S.) 248, to be guilty of larceny if he wrongfully retains it under claim that he is the true owner.

Liens. Explosives used in the construction of a railroad roadbed are held, in Schaghticoke Powder Co. *v.* Greenwich & J. R. Co. (N. Y.) 2 L.R.A.(N.S.) 288, to be materials used in the improvement of property, within a mechanics' lien statute.

Limitation of actions. A statutory provision that causes of action for the balance due upon a mutual and open account current shall be deemed to have accrued at the time of the last item proved in the account is held, in Koelzer *v.* First Nat. Bank (Wis.) 2 L.R.A.(N.S.) 571, not to apply to a general bank-deposit account.

Mandamus. Mandamus is held, in State *ex rel.* Wyman, P. & Co. *v.* Spokane County Superior Court (Wash.) 2 L.R.A.(N.S.) 568, to be the proper remedy to prevent a court having exclusive jurisdiction to hear and determine a proceeding from ordering a change of venue.

Manufacturer. A manufacturer who fraudulently uses and conceals defective material in an implement is held, in Kuelling *v.* Roderick Lean Mfg. Co. (N. Y.) 2 L.R.A.(N.S.) 303, to be liable for injury caused thereby, although the implement had passed through the hands of wholesale and retail dealers, so that there was no privity of contract between the manufacturer and the person injured.

Marriage. Common-law marriages, consummated in accordance with the rules of the common law, are held, in Reaves *v.* Reaves (Okla.) 2 L.R.A.(N.S.) 353, not to be forbidden by the statute on the subject of marriage.

The power of the legislature to forbid the marriage of epileptics when the woman is under forty-five years of age is upheld in Gould *v.* Gould (Conn.) 2 L.R.A.(N.S.) 531.

Master and servant. Complaint to the authorities that coal furnished was bad for making steam, without anything to show that it was unsafe or dangerous to handle,

was held, in Vissman *v.* Southern R. Co. (Ky.) 2 L.R.A.(N.S.) 469, inadmissible in an action against a railroad company for injuries to an employee in attempting to break a lump of coal containing rock and slate.

An employer maintaining a negligently constructed elevator is held liable, in Siegel, C. & Co. *v.* Treka (Ill.) 2 L.R.A.(N.S.) 647, for injuries to an employee, which would not have occurred in the absence of such negligence, although the act of a fellow employee brought the injured person into contact with the defect.

Mortgage. The lien of a mortgage on the property of an assignor is held, in McDaniel *v.* Osborn, (Ind.) 2 L.R.A.(N.S.) 615, not to be displaced by a statute providing that all debts due for labor shall, when the debtor's property passes into the hands of an assignee, be paid in full before paying any other except legitimate costs and expenses.

A deed executed by the borrower at the time a loan is made and a note and mortgage delivered as security therefore, to be placed in escrow for delivery to the mortgagee in case of default in payment of debt, is held, in Plummer *v.* Isle (Wash.) 2 L.R.A.(N.S.) 627, to be itself a mortgage, and to continue as such after default, the surrendering of the securities, and the delivering and recording of the deed.

Municipal corporations. The maintenance by a municipality of a lockup or jail is held, in Carty *v.* Winooski (Vt.) 2 L.R.A.(N.S.) 95, to be a governmental function, for negligence in the performance of which it is not liable.

The responsibility of municipal corporation for the acts of the members of a park commission created by its charter and appointed by the mayor is denied in Denver *v.* Spencer (Colo.) 2 L.R.A.(N.S.) 147.

Nuisance. The careful operation of a brick kiln on land is held, in Phillips *v.* Lawrence Vitrified Brick & T. Co. (Kan.) 2 L.R.A.(N.S.) 92, not to render the owner liable to adjoining property owners as for a nuisance, although slight and trivial injury is done to their property by smoke, dust, and cinders.

Parent and child. The right of a mother to dispose of the custody of minor children by will is denied in Hernandez *v.* Thomas (Fla.) 2 L.R.A.(N.S.) 203.

Partners. The right of partnership creditors to attack a conveyance of partnership property by an insolvent member of the firm in discharge of his individual debt is denied in First Nat. Bank *v.* Brubaker (Iowa) 2 L.R.A.(N.S.) 256,—at least when the conveyance is made with the consent of other members of the firm.

Party wall. A contract to pay one half the value of a party wall when the promisor made use of it, expressed to be binding upon the heirs and assigns of the parties, is held, in Southworth *v.* Perring (Kan.) 2 L.R.A.(N.S.) 87, to create a covenant running with the land of each party.

Physicians and surgeons. A contract, by one having no license to practice medicine, on behalf of himself and a medical institute owned by him, is held, in Deaton *v.* Lawson (Wash.) 2 L.R.A.(N.S.) 392, to be absolutely void, although he employed regularly licensed physicians for the performance of his engagements.

Power of sale. The power of an executor, under a direction in a will to sell real estate and distribute the proceeds, is held, in Starr *v.* Willoughby (Ill.) 2 L.R.A.(N.S.) 623, not destroyed by an order of court declaring the estate settled, and discharging him as executor.

Prohibition. That prohibition will not lie to restrain a court from proceeding with a case in which it has erroneously denied a change of venue is held, in State *ex rel.* Miller *v.* Spokane County Superior Court (Wash.) 2 L.R.A.(N.S.) 395.

Railroads. The right of a railroad company to use electricity as a motive power is upheld in Howley *v.* Central Valley R. Co. (Pa.) 2 L.R.A.(N.S.) 138, although the charter is silent on the subject of motive power, and at the time of the passage of the statute providing for incorporation electricity was unknown as a motive power.

It is held, in Louisville, H. & St. L. R. Co. *v.* Hathaway's Admrx. (Ky.) 2 L.R.A.(N.S.) 498, that trainmen are not bound to stop a train as soon as an object on the track, seen by them, "looks like a man;" but that they may wait until the fact that it is a man appears.

Sale. The right of a seller under a conditional sale to recover the unpaid purchase price, notwithstanding the destruc-

tion of the property without the purchaser's fault before the price fell due, is affirmed in Lavalley *v.* Ravenna (Vt.) 2 L.R.A.(N.S.) 97.

Attaching a draft for the purchase price to the bill of lading, and forwarding it for collection, are held, in Greenwood Grocery Co. *v.* Canadian County Mill & E. Co. (S. C.) 2 L.R.A.(N.S.) 79, to reserve title in the consignor, notwithstanding that the bill of lading is in the name of the consignee; and, if the draft is excessive, the consignee does not acquire the title by tendering the correct amount due.

The title under a regular C. O. D. order for liquor is held, in Golightly *v.* State (Tex. Crim. App.) 2 L.R.A.(N.S.) 383, to pass at the place of shipment, notwithstanding the assurance to purchaser that he will not have to take the goods unless he wants them, and that, if lost in transportation, the loss will not fall on him.

Horses, wagons, and harness of a livery-stable keeper are held, in Everett Produce Co. *v.* Smith (Wash.) 2 L.R.A.(N.S.) 331, not to be within a statute requiring the purchaser of "any stock of goods, wares, or merchandise in bulk" to take a statement under oath of the creditors of the seller.

Tender by the seller is held, in Bell *v.* Hatfield (Ky.) 2 L.R.A.(N.S.) 529, not to be necessary in order to hold the buyer liable for breach, where the latter failed to designate the day of delivery, as required by contract, and was not present at the place of delivery called for by the contract during the time delivery could have been called for according to its terms.

Servant's liability to third person. A servant is held, in Ellis *v.* Southern R. Co. (S. C.) 2 L.R.A.(N.S.) 378, to be personally liable to third persons, when his wrongful act in the course of his employment, whether of nonfeasance or misfeasance, is the direct and proximate cause of their injuries.

Specific performance. A provision for liquidated damages in case of a breach of contract for exchange of lands is held, in Koch *v.* Streuter (Ill.) 2 L.R.A.(N.S.) 210, not to defeat a right for specific performance, where the provision was intended merely as security for performance.

Failure to specify the time within which a contract for sale is to be performed is held, in Ullsperger *v.* Meyer (Ill.) 2 L.R.A.(N.S.) 221, not to defeat its specific performance.

Subrogation. Executing a note for another's debt is held, in Ft. Jefferson Improv. Co. *v.* Dupoyster (Ky.) 2 L.R.A.(N.S.) 263, to be equivalent to a payment in cash for purposes of subrogation.

Taxes. The home port, for purposes of taxation of a vessel owned by residents of different states, is held, in Olson *v.* San Francisco (Cal.) 2 L.R.A.(N.S.) 197, to be that nearest the residence of her managing owner, although temporarily registered in another state, engaged in commerce on the high seas, and never within the state in which the port is located.

Claims of a nonresident corporation, in definite, tangible form, are held taxable in Monongahela River C. C. & C. Co. *v.* Board of Assessors (La.) 2 L.R.A.(N.S.) 637, similar property owned by a resident being subject to taxation.

Trading stamps. The power of the legislature to forbid the use of trading stamps is denied in *Ex parte* Drexel (Cal.) 2 L.R.A.(N.S.) 588.

Trusts. A grant to a trustee without the use of the words "heirs" is held, in Smith *v.* Proctor (N. C.) 2 L.R.A.(N.S.) 172, to pass a fee if the duties of the trust require the trustee to possess the fee, and it is the clear intention of the grantor that he shall do so.

Wills. The interest of a legatee is held, in *Re* Holbrook (Pa.) 2 L.R.A.(N.S.) 545, to cease at marriage, under a will giving one the income of a fund "during the term of her natural life, or so long as she remains unmarried," with a gift over on death or marriage.

A bequest to each of the testator's children is held, in Pimel *v.* Betjemann (N. Y.) 2 L.R.A.(N.S.) 580, to have no application to a child who died before the will was made, so as to create an interest upon which a statute to prevent the lapsing of legacies can operate.

An unattested holographic will, executed in a foreign country according to its laws, by a citizen of one of the United States domiciled there, is held, in Lindsay *v.* Wilson (Md.) 2 L.R.A.(N.S.) 408, to pass real property subsequently acquired in that state, under a statute providing that every will made out of the state shall be held

valid, if made according to the forms required by the law of the place where the same is made, or where such person is residing at the time that it is made.

The right of the state to contest a will merely because there is a probability that some heir may fail to appear and claim the property, so as to permit proceedings to declare an escheat, and that the heir may fail to appear within the statutory period thereafter to claim the property, so that the state's title may become absolute, is denied in State v. Superior Court (Cal.) 2 L.R.A. (N.S.) 643.

New Books.

"The Legislative History of Naturalization in the United States from the Revolutionary War to 1861." By Frank George Franklin. (Chicago, University of Chicago Press.) 1 vol. $1.50.

This book is by the professor of history and political science in the University of the Pacific. In the interest that has recently been shown in the needed reform of our naturalization laws, the book is specially timely and valuable.

"Legal Ethics and Suggestions for Young Counsel." By Henry W. Williams, late Justice of the Supreme Court of Pennsylvania. Prepared for the press by Carlyle H. Ross. (George T. Bisel Co., Philadelphia, Pa. 1906.) 1 vol. $1.50.

This is a forceful and clear presentation to young lawyers of the most important questions relating to the ethics of their profession, and the habits, character, and conduct of a good lawyer.

"Recollections of a Country Lawyer." (If They Ain't Recollections What in Tophet are They?) By Sol. L. Long, Lawyer, Arkansas City, Kan. For sale by the perpetrator and everyone else who happens to have a copy. Cloth, $1. Paper, 50 cts.

The text contains a good many personal incidents, and many other things. The author says: "All the names in this treatise are not the sure-enough names of the parties; but I'll bet they're plain enough to bring me in two or three good lickings."

"Report of the Seventeenth Annual Meeting of the Virginia State Bar Association." Edited by John B. Minor. (Everett Waddey Co., Richmond, Va. 1905.)

Much delay in the publication of this report is explained by the printers' strike. The Virginia Bar Association has become one of the conspicuous State Bar Associations of the country. In this year's proceedings are important addresses by Hannis Taylor on "Legitimate Functions of Judge-made Law." "The Action of Ejectment, Its Uses and Abuses." By Archer A. Phlegar. "Lord Mansfield and His Relation to Our Laws." By William L. Royall. And the "Reform of Our Land Laws." By Eugene C. Massie.

"Pleading and Practice in the Courts of Record of New York." By Clark A. Nichols. (Matthew Bender & Co., Albany.) $6.

"New York Insurance Law." By Andrew Hamilton. (Banks & Co., Albany, N. Y.) Buckram, $2. Paper, $1.50.

"The Insurance Law of Illinois." By Walter E. McCornack. (Callaghan & Co., Chicago.) $6.

"Business Corporation Laws, Codified." (Pennsylvania.) By Joseph A. Culbert. (Evangelical Press, Harrisburg, Pa.) $3.50.

"Illinois Citations and Table of Cases." (Fiske & Co., Springfield.) 2 vols. $15.

"Corporation Legal Manual." By E. Q. and F. W. Keasbey. (Corporation Legal Manual Co., New York.) $5.

"Motions and Rules at Common Law." According to the practice of the Court of Common Pleas of Pennsylvania. By J. Tyndale Mitchell. 2d ed., enlarged and annotated. (Rees, Welsh, & Co., Philadelphia.) $2.50.

"General Rules of Practice in New York Courts of Record." By Marcus T. Hun. (Banks & Co., Albany, N. Y.) $3.

"New York Court of Appeals Rules." Annotated. By Edmund H. Smith. 7th ed. (Banks & Co., Albany, N. Y.) $1.50.

"Annotations on Tennessee Decisions." By Robert T. Shannon. (Marshall & Bruce Co., Nashville.) $8.

"New York Insurance Law." By Amasa J. Parker, Jr. (Banks Law Publishing Co., New York.) $2.50.

Finkelnburg's "Missouri Practice." New ed. (Keefe-Davidson Co., St. Paul, Minn.) $4.50.

"Railroad Rate Regulation." With Railroad Rate act of 1906. By Joseph H. Beale,

Jr., and Bruce Wyman. (William J. Nagel, Boston, Mass.) $6.

"Hotels and Innkeepers." Including other public houses. By Joseph H. Beale, Jr. (William J. Nagel, Boston, Mass.) $6.

Hutchinson on "Carriers." New ed. (Callaghan & Co., Chicago.) 2 vols. $12. Ready about September 1st.

"Railroad Rate Act of 1906." By DeWitt C. Moore. (Matthew Bender & Co., Albany, N. Y.) 50 cts.

"The Law of Automobiles." By Xenophon P. Huddy. (Matthew Bender & Co., Albany, N. Y.) $3.50.

"The Law of Carriers." By DeWitt C. Moore. (Matthew Bender & Co., Albany, N. Y.) $6.30.

Cook's "Annotated Criminal & Penal Codes." (New York.) (Matthew Bender & Co., Albany, N. Y.) $5.

"Cases on Evidence." By John H. Wigmore. (Little, Brown, & Co., Boston.) $5.

Parker's "Pocket Annotated Criminal and Penal Codes." (New York.) (Banks Law Publishing Co., New York City.) $3.50.

Chase's "Pocket Code of Civil Procedure." (New York.) (Banks Law Publishing Co., New York.) $3.50.

Recent Articles in Law Journals and Reviews.

"The Law of Bank Checks (Practical Series)."—23 Banking Law Journal, 179, 263, 345.

"Demand Notes and Indorser's Liability."—23 Banking Law Journal, 269.

"Joint Deposits and Payment to Survivor."—23 Banking Law Journal, 361.

"Misconduct of the Bench as Reversible Error — Continued."—38 Chicago Legal News, 336.

"The Law Relating to Trade Unions."—38 Chicago Legal News, 337.

"The Right of an Injured Employee to Enforce Collection of a Judgment for Damage for Personal Injuries against an Insolvent Employer in an Action against an Insurance Company Which Has Insured the Employer against Claims of This Character, under What is Known as Employer's Liability Insurance."—62 Central Law Journal, 417.

"The Legal Status of the Indians in the United States."—62 Central Law Journal, 399.

"Right of Privacy."—12 Virginia Law Register, 91.

"Corporate Self-Incrimination—(Conclusion)."—32 National Corporation Reporter, 505.

"Rights and Liabilities of Foreign Insurance Companies in Canada."—5 Canadian Law Review, 249.

"Land Registration in the Territory of Hawaii."—40 American Law Review, 321.

"The Right of Jury Trial in the Dependencies."—40 American Law Review, 340.

"The Great Usurpation. (Right of courts to declare statutes unconstitutional.)"—40 American Law Review, 356.

"Neutral Territorial Waters as a Naval Base."—40 American Law Review, 402.

"'Peopleization' as a Solution of the Corporation Problem."—32 National Corporation Reporter, 529.

"The Commerce of the United States with Foreign Countries."—32 National Corporation Reporter, 540.

"Liability of Lessor of Railroad for Lessee's Negligence Resulting in Injury to Latter's Employee."—32 National Corporation Reporter, 541.

"Precatory Trusts."—42 Canada Law Journal, 369.

"Antenuptial Agreement Restricting Right to Divorce."—10 Law Notes, 47.

"Transfers of After-Acquired Personal Property."—19 Harvard Law Review, 557.

"Constitutional Protection of Decrees for Divorce."—19 Harvard Law Review, 586.

"Vested Gifts to a Class and the Rule against Perpetuities."—19 Harvard Law Review, 598.

"Fraudulent Conveyances."—14 American Lawyer, 252.

"Criminal Law Reform (concluded)."—14 American Lawyer, 254.

"Limitation on Right of Equity to Grant Interlocutory Relief by Injunction."—62 Central Law Journal, 453.

"State Regulation of Railroad Rates and Charges."—62 Central Law Journal, 458.

"Warranties and Representations in Insurance Policies."—62 Central Law Journal, 479.

"The Next Constitutional Convention of the United States."—68 Albany Law Journal, 145.

"The Closed Shop Controversy."—18 Green Bag, 339.

"A Recent Chapter of the English Constitution."—15 Yale Law Journal, 315.

"Ratification in Agency without Knowledge of Material Facts."—15 Yale Law Journal, 331.

"A Man and His Name."—15 Yale Law Journal, 341.

"No Copyright in the Title of a Literary or Dramatic Work."—62 Central Law Journal, 437.

"Validity of Municipal Ordinances Regulating the Inspection and Sale of Milk and Cream."—62 Central Law Journal, 439.

"Right of Jury to Pass on Question of Genuineness of Handwriting with or without Regard to Evidence of Witnesses."—62 Central Law Journal, 444.

"Conflict of Laws upon the Subject of Marriage and Divorce."—15 Yale Law Journal, 387.

"Partition of a Vessel in Admiralty."—15 Yale Law Journal, 394.

"The Recent Conference on Divorce."—15 Yale Law Journal, 401.

"The Divorce Congress and Suggested Improvements in the Statutory Law Relating to Divorce."—15 Yale Law Journal, 405.

"Special Legislation as Defined in the Illinois Cases."—1 Illinois Law Review, 63.

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HIS LAST LEGAL OPINION.—A souvenir postal card from Hudson, Mich., contains a picture of a monument in a cemetery finished at the top with a pile of law books and the following inscription on the face of the stone: "Fellow pilgrims, help in trouble, if you get it, comes from nature, humanity, knowledge, here on this earth,—nowhere else. Think of it. L. R. Pierson, Attorney at Law, Hudson, Mich. No charges."

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